

Issues: Qualification – Benefits/Leave (Compensatory Leave), Management Actions (Emergency Closings and Assignment of Duties); Ruling Date: May 31, 2013; Ruling No. 2013-3617; Agency: Department of Behavioral Health and Developmental Services; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

QUALIFICATION RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2013-3617
May 31, 2013

The grievant has requested a ruling from the Office of Employment Dispute Resolution (EDR) on whether her November 15, 2012 grievance with the Department of Behavioral Health and Developmental Services (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

In November 2010, the agency issued a policy designating all employees at the grievant’s facility as “essential” during inclement weather conditions as of December 1, 2010. Forty-four employees were changed from non-essential to essential status as a result, and all were notified by personal letter. The grievant, who is employed by the agency as an Administrative and Support Specialist II, was one of the forty-four employees changed to “essential” status in inclement weather. On October 29 and 30, 2012, all Executive Branch state agencies were closed due to inclement weather; only essential employees were required to report to work. The grievant did not report to work on October 29 and 30, and, because of her classification as essential, was required to use accrued leave to cover her absence on those days. On November 15, 2012 the grievant filed a grievance challenging her designation as an essential employee.

DISCUSSION

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.¹ Additionally, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.² Thus, claims relating to issues such as to the methods, means, and personnel by which work activities are to be carried out generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management’s decision, or whether state policy may have been misapplied or unfairly applied.³ In this case, the grievant has appears to allege that the agency misapplied policy in

¹ See *Grievance Procedure Manual* § 4.1.

² See Va. Code § 2.2-3004(B).

³ Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b), (c).

designating her as an essential employee because her role does not have a designated essential function in the agency's Continuity Plan for inclement weather conditions.

For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."⁴ Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action. An adverse employment action is defined as a "tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."⁵ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁶ For purposes of this ruling only, it will be assumed that the grievant has alleged an adverse employment action in that she asserts issues with the terms and benefits of her employment.

Department of Human Resource Management ("DHRM") Policy 1.35, *Emergency Closings*, states that designated employees are "exempt and non-exempt employees who are required to work during an authorized closing because their positions have been designated by their agencies as essential to agency operations during emergencies."⁷ Furthermore, "[a]gencies may designate different employees as essential for different situations" based on their needs.⁸ In accordance with DHRM Policy 1.35, the agency established a policy, effective December 1, 2010, designating all employees at the grievant's facility essential "during periods of extreme weather."

The grievant argues that the designation of all employees at her facility as essential during extreme weather is a misapplication of policy. In support of her claim, she cites the Virginia Department of Emergency Management's *Guide to Identifying Mission Essential Functions and Conducting Business Process Analyses* (the "*Guide*"), which is a template for agencies to use in designating essential personnel and developing effective Continuity Plans. Specifically, the grievant asserts that the agency has not correctly interpreted or applied the *Guide*. However, the agency has stated, and the grievant acknowledges, that the *Guide* is not a policy mandate, but a resource for agencies to use in creating emergency response plans. In addition, the *Guide* states that some nonessential activities are necessary for an agency to carry out its overall essential functions, and such activities should be considered essential supporting activities. Essential designations "should include staff needed for essential supporting activities" as well as essential functions. Such activities may include, for example, managing human

⁴ See *Grievance Procedure Manual* § 4.1(b).

⁵ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁶ *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007).

⁷ DHRM Policy 1.35, *Emergency Closings*.

⁸ *Id.* While the grievant argues that "[t]here is no policy or supporting statement . . . which allows agencies to designate employee [sic] as 'essential'" in only certain types of situations, such as inclement or extreme weather, DHRM Policy 1.35 specifically grants agencies the authority to do so.

resources, agency facilities, or organization records, all of which the agency could well consider within the grievant's ability to perform during inclement or extreme weather.

Most importantly, however, the grievant has not identified a specific policy provision that the agency has misapplied or unfairly applied in its designation of essential personnel. Management has significant discretion in the administration of its policies and its standard facility operating procedures.⁹ EDR cannot second-guess management's decisions regarding the administration of such procedures, absent evidence that the agency's actions are plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.¹⁰ In this case, the grievant has not presented evidence that the agency's policy designating all staff as essential is either inconsistent with other decisions or is arbitrary or capricious. Accordingly, the grievance does not qualify for a hearing on this basis.

Additionally, the grievant argues that she was not notified of the change in her status from non-essential to essential when the agency designated her as such. DHRM Policy 1.35, *Emergency Closings*, states that "[e]mployees must be notified of their status as soon as practicable after any . . . change in status" from non-essential to essential.¹¹ The grievant asserts that "[p]rior to October 29, 2012 [she] was not made aware of redesignation."¹² When the agency issued the extreme weather policy in 2010, all forty-four affected employees were notified by personal letter of their change in status. Furthermore, the grievant's Employee Work Profile states that she will maintain and be familiar with her facility's Instruction Manual, and the narrative on her 2011-2012 Performance Evaluation states that she maintains the Instruction Manual for her facility. The extreme weather policy, as one of the facility's operating policies and procedures, is a part of the facility's Instruction Manual as maintained by the grievant. Although the grievant claims that she was not personally notified of her essential designation, based on the factors above she must be viewed to have known or should have known of her status as an essential employee during extreme weather. Consequently, the grievance does not qualify for a hearing on this basis.

EDR's qualification rulings are final and nonappealable.¹³



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⁹ See e.g. EDR Ruling No. 2011-2903.

¹⁰ See e.g. EDR Ruling No. 2009-2090.

¹¹ DHRM Policy 1.35, *Emergency Closings*.

¹² During the management steps, the agency concluded that the grievance is not timely to challenge the grievant's designation as an essential employee because she did not file her grievance within 30 calendar days of the date on which she was advised of her change in status when the policy became effective in 2010. The grievant appears to have not experienced any adverse action (i.e., use of accrued leave during extreme weather) as a result of this designation until October 29 and 30, 2012. Because she filed her grievance within 30 calendar days of the adverse action at issue, this grievance is timely to challenge these effects of the grievant's essential designation.

¹³ Va. Code § 2.2-1202.1(5).